FILED
MAR 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1395

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NATIONAL STEEL CORPORATION,
Petitioner,

v.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,
Respondent.

On Petition For Writ Of Certiorari From The Supreme Court Of Appeals Of West Virginia

BRIEF AMICI CURIAE

MICHAEL A. ALBERT
JACKSON, KELLY, HOLT & O'FARRELL
1600 Laidley Tower
P. O. Box 553
Charleston, West Virginia 25322

Counsel for Diamond Shamrock Corporation, E. I. duPont de Nemours & Company, Inc., The Fostoria Glass Company, Globe Refractories, The Goodyear Tire & Rubber Company, Keyser Glass Container Company, Inc., Koppers Company, Inc., The Homer Laughlin China Company, Monsanto Company, Quaker State Oil Refining Corporation, Signode Supply Corporation, and Wheeling-Pittsburgh Steel Corporation

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

INTRODUCTION 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

A. The Lack of Meaningful Notice and the Scant Opportunity to "Comment" on a Closed Record Deprived the Affected Customers of the Due Process of Law Guaranteed Them Under the Constitution of the United States 4

B. The Actions of Respondent Constitute Retroactive Ratemaking and Are Therefore Violative of the Fourteenth Amendment 10

CONCLUSION 13

TABLE OF AUTHORITIES

CASES: Page

Arizona Grocery Company v. *Atchison, Topeka, & Santa Fe Railway Company, et al.*, 284 U.S. 370 (1932) 11

Board of Public Utility Commissioners, et al. v. *New York Telephone Company*, 271 U.S. 23 (1926) 4, 11

Chesapeake and Potomac Telephone Company of West Virginia v. *Public Service Commission of West Virginia*, 300 S.E.2d 607, 619 (W.Va. 1982) 10

Goss v. *Lopez*, 419 U.S. 565 (1975) 4, 8

Interstate Commerce Commission v. *Louisville and Nashville Railroad Company*, 227 U.S. 88 (1913) 4, 9

Ohio Bell Telephone Company v. *Public Utilities Commission of Ohio*, 301 U.S. 292 (1937) 4, 5

Pierce v. *Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925) 4, 5

Robinson v. *Hanrahan*, 409 U.S. 38 (1972) 8

Virginia Electric and Power Co. v. *Public Service Commission of West Virginia*, 162 W.Va. 202, 248 S.E.2d 322 (1978) 4, 10

CONSTITUTION AND STATUTES:

U.S. Const. amend. XIV, §1, cl. 2 5

W.Va. Code §24-2-3 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

85-1395

NATIONAL STEEL CORPORATION,

Petitioner,

v.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,

Respondent.

On Petition For Writ Of Certiorari From The Supreme Court of Appeals of West Virginia

---

BRIEF AMICI CURIAE

INTRODUCTION

Diamond Shamrock Corporation, E. I. duPont de Nemours & Company, Inc., The Fostoria Glass Company, Globe Refractories, The Goodyear Tire & Rubber Company, Keyser Glass Container Company, Inc., Koppers Company, Inc., The Homer Laughlin China Company, Monsanto Company, Quaker State Oil Refining Corporation, Signode Supply Corporation, and Wheeling-Pittsburgh Steel Corporation are a repre-

sentative group of present or former industrial customers of Columbia Gas of West Virginia, Inc., which subsequently became Mountaineer Gas Company ("Mountaineer Gas"), and are *amici curiae* pursuant to the written consent of the parties simultaneously filed with this Court.

The interests of *amici curiae* in this case arise from the fact that they are aggrieved, as is petitioner, by an order of the Supreme Court of Appeals of West Virginia, denying review of respondent's order of July 10, 1985. *Amici curiae* petitioned the Supreme Court of Appeals of West Virginia for review of respondent's July 10, 1985, "Commission Order Approving Repayment Obligations After Further Comment" (Pet. App. B, p. 45a); however, unlike the petitioner, *amici curiae* were not parties to the proceedings before the respondent at the regulatory level.

The perspective of *amici curiae* in this case highlights the due process infirmities of the actions of the respondent and should assist this Court in a more thorough inquiry of that constitutional issue.

STATEMENT OF THE CASE

Amici curiae adopt by reference the Statement of the Case set forth in the Petition. A brief review of the necessarily limited involvement of the customers of Mountaineer Gas may assist this Court in focusing on the constitutional principle at stake.

On October 13, 1983, Columbia Gas was ordered by respondent to publish respondent's "Commission Order Establishing a Procedural Schedule" as a public notice, pursuant to that Order's terms. Pet. App. E,

p. 78a. Although the petitioner had intervened as an industrial customer in the proceeding before respondent, the remaining industrial customers only became aware of the devastating impact of Case No. 83-348-G-30C after receipt of respondent's June 13, 1985, "Order On Further Reconsideration," nearly *two years* after the initiation of the proceeding. That June 13, 1985, Order is referred to in respondent's Order of July 10, 1985, (Pet. App. B, p. 45a), and provided *amici curiae* and similarly situated nonparticipants *less than two weeks* (i.e., until June 24, 1985) in which to review the entire record in Case No. 83-348-G-30C, obtain counsel, and file comments with respondent about the accuracy of Staff's "calculations and methodologies" in developing the over/under-recovery balances later set forth in the July 10, 1985, Order's two Appendices. Pet. App. B, pp. 53a and 54a. Those "calculations and methodologies" were not contained in the respondent's order, nor were customers told how those calculations and methodologies could be obtained. The overwhelming majority of the parties affected by the Order of the respondent had at best a limited opportunity to participate in Case No. 83-348-G-30C.

SUMMARY OF ARGUMENT

I. Corporate citizens of the United States are entitled to due process in state actions which imperil their property, including state action such as the regulatory proceedings of respondent in Case No. 83-348-G-30C. The requirements of Rule 30C *promulgated by the respondent* conflict directly with the actions of respondent in Case No. 83-348-G-30C in assessing rates for prior periods not covered by the

scope of Rule 30C. This substantial deviation by respondent from its rule, without meaningful notice to the affected parties, deprived the former and present customers of Mountaineer Gas of the due process of law guaranteed by the Fourteenth Amendment. As a result, those customers lacked the constitutionally mandated opportunity to confront and cross-examine witnesses who testified contrary to their interests. *Pierce* v. *Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510; *Ohio Bell Telephone Company* v. *Public Utilities Commission of Ohio*, 301 U.S. 292; *Interstate Commerce Commission* v. *Louisville and Nashville Railroad Company*, 227 U.S. 88; *Goss* v. *Lopez*, 419 U.S. 565.

II. Respondent engaged in retroactive ratemaking contrary to applicable statutory law of West Virginia. The actions of respondent violated the due process clause of the Fourteenth Amendment. *Virginia Electric and Power Co.* v. *Public Service Commission of West Virginia*, 162 W.Va. 202, 248 S.E.2d 322 (1978); *Board of Public Utility Commissioners, et al.* v. *New York Telephone Company*, 271 U.S. 23.

ARGUMENT

A. THE LACK OF MEANINGFUL NOTICE AND THE SCANT OPPORTUNITY TO "COMMENT" ON A CLOSED RECORD DEPRIVED THE AFFECTED CUSTOMERS OF THE DUE PROCESS OF LAW GUARANTEED THEM UNDER THE CONSTITUTION OF THE UNITED STATES.

The industrial customers of Mountaineer Gas are corporate citizens of the United States and are assured procedural due process in all state actions in which their property is at stake:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law;

U.S. Const. amend. XIV, §1, cl. 2. *Pierce* v. *Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510. The actions of the respondent are regulatory proceedings and constitute state action within the meaning of the Fourteenth Amendment. *Ohio Bell Telephone Company* v. *Public Utilities Commission of Ohio*, 301 U.S. 292. The issue before this Court is therefore whether the actions of the respondent, in assessing retroactive rates contrary to the limited prescription of Rule 30C and the provisions of the West Virginia Code, deprived those industrial customers of Mountaineer Gas of due process of law.

Under the "Commission Order Establishing a Procedural Schedule" entered October 13, 1983 (Pet. App. E, p. 78a), which was printed as a legal advertisement in newspapers of general circulation in the service territory of Columbia Gas, the respondent scheduled a hearing to be conducted on Columbia's purchased gas costs as determined pursuant to the respondent's Rule 30C. The notice did not, in any way, indicate that the potential existed in Case No. 83-348-G-30C for *ex post facto*, "underrecovery" assessments dating back to 1980 and touching even former customers of Columbia Gas no longer served by Mountaineer Gas, Columbia's successor. No reasonable consumer reading the published notice would conceive of the potential impact of the proceeding before respondent:

> Application to change rates, effective November 1, 1983, according to Rule 30C, General Order No. 183.4, Purchased Gas Application.

Pet. App. E, p. 78a. This is the *only* portion of the notice which addresses the scope of Case No. 83-348-G-30C, and was arguably the only notice received by those customers who chose not to participate in the proceeding before respondent. Any customer who reviewed respondent's published version of its Rule 30C, the rule referenced in the legal notice, would not reasonably assume that the proceeding would lead to retroactive assessments. This Court need only compare the text of Rule 30C with the outcome of Case No. 83-348-G-30C reflected in the July 10, 1985, Order (Pet. App. B, p. 45a) to realize that respondent's order constitutes an obvious deprivation of due process. Rule 30C reads in pertinent part:

> This rule sets forth a procedure for changing the *rates* per Mcf charged to customers . . .
>
> * * *
>
> (A) APPLICATION
>
> Any change under this rule in the rates charged by a gas utility shall apply for a twelve-month period *from November 1 through October 31*. Each gas utility that requests an *adjustment in its rates* to reflect purchased gas costs shall submit an application on or before August 1. The application shall include *proposed rates* that reflect estimated purchased gas costs for the annual period *beginning on November 1*. The application shall also include a statement of actual purchased costs, cost over and under recovery and refund data *for the twelve months*

ending June 30, and such other supporting information as the Commission may require.

* * *

(3) NET OVER OR UNDER RECOVERY OF PURCHASED GAS COSTS

* * *

(e) Subtract the amount obtained in (d) from the gross over or under recovery for the period obtained in (D)(2)(a) to obtain the net amount of cost over or under recovery *in the preceding period to be recovered in the current period.*

* * *

(D) OVER OR UNDER RECOVERY OF PURCHASED GAS COSTS

The amount of allowable purchased gas costs determined in division (c) shall be increased or decreased by the amount of over and under recovery of purchased gas costs *in the preceding period.*

(E) PURCHASED GAS RATE

* * *

The product so obtained shall equal the rate per Mcf *to be rolled into the base rates of the utility for the current period.*

Pet. App. E, p. 65a (emphasis added). Despite the clear wording of Rule 30C, respondent's July 10, 1985, Order by its own terms (e.g., "payment" of "prior period purchased gas costs") imposed surcharges on prior gas purchases entirely unrelated to the "pro-

posed rates" referenced in Rul3 30C. Pet. App. B, p. 45a. Rule 30C and the single legal notice promulgated by respondent fail to give the slightest hint of the harsh treatment which the industrial customers of Columbia Gas eventually received as a consequence of the improper order in Case No. 83-348-G-30C. The text of Rule 30C and the solitary legal notice published by Columbia Gas are the most eloquent and persuasive arguments that the affected parties were deprived of due process in Case No. 83-348-G-30C.

The Fourteenth Amendment mandates that parties whose property rights are potentially affected by state action are entitled to a hearing. It is a necessary precedent to that mandate that parties be given meaningful notice of that hearing. This fundamental constitutional principle was enunciated more than a century ago in a decision by this Court:

> "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin* v. *Hale*, 1 Wall 223, 233, 17 L.Ed. 531 (1864).

Goss v. *Lopez*, 419 U.S. 565, 579. This Court has granted petitions for review in the past to preserve the principle that notice of state action must be *meaningful* notice. For example, in *Robinson* v. *Hanrahan*, 409 U.S. 38, the State of Illinois knowingly mailed an otherwise adequate notice to the former address of an incarcerated person. The state caprice at issue in *Robinson* pales when compared to the regulatory scheme at issue here. This case involves not the form or receipt of notice, but instead the content.

Most of the affected customers of Mountaineer Gas were in the same position as the petitioner in *Robinson*—unable to register opposition until well after Case No. 83-348-G-30C had been concluded to their detriment.

This Court established decades ago the fundamental right of administrative due process to confront and cross-examine those who present evidence against one's interests in regulatory proceedings.

> A finding without evidence is arbitrary and baseless. . . [I]t has been distinctly recognized that administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; . . .

Interstate Commerce Commission v. *Louisville and Nashville Railroad Company*, 227 U.S. 88, 91. When viewed in the light of Rule 30C (Pet. App. E, p. 65a) and the sole notice of the proceeding (Pet. App. E, p. 78a), respondent's arbitrary deviation from the standards of its promulgated Rule 30C made the hearing in Case No. 83-348-G-30C a nullity.

The opportunity to confront and cross-examine members of respondent's staff and the other witnesses, as well as to submit their own evidence, was denied the vast majority of the affected industrial customers. Long before respondent informed the customers by actual notice of the true (if improper) nature of Case No. 83-348-G-30C, the exhibits were submitted, testimony taken, pleadings and briefs filed and a decision rendered. A specific group of customers of a public utility, each identified by name, were collectively handed a bill for approximately

$3,000,000 for prior gas service, subject only to an opportunity to "comment" within ten days. Any questions of witnesses went unasked and unanswered. No reply to the various pleadings could be filed. Instead, the permissible "comments" were limited to the "calculations and methodologies" of respondent's staff. Given respondent's improper deviation from Rule 30C, which was *not* subject to "comment," those "calculations and methodologies" amounted to no more than a financial body count. The affected persons were *never* provided with a meaningful notice of or opportunity to argue Case No. 83-348-G-30C on the merits.

B. THE ACTIONS OF RESPONDENT CONSTITUTE RETROACTIVE RATEMAKING AND ARE THEREFORE VIOLATIVE OF THE FOURTEENTH AMENDMENT.

The provisions of W. Va. Code § 24-2-3 (Pet. App. D) and Rule 30C permit only a prospective recovery of the "underrecovered" prior year's purchased gas costs through the *rates* charged on and after November 1, 1983. The Supreme Court of Appeals of West Virginia has clearly established that respondent is limited by state statute in its determination of utility rates to *prospective* adjustments only. *Virginia Electric and Power Co.* v. *Public Service Commission of West Virginia*, 162 W.Va. 202, 248 S.E.2d 322 (1978); *Chesapeake and Potomac Telephone Company of West Virginia* v. *Public Service Commission of West Virginia*, 300 S.E.2d 607 (W.Va. 1982). Yet, in Case No. 83-348-G-30C, the respondent authorized retroactive billing. The retroactive nature of the respondent's action is evidenced by the fact that *amici*

curiae were delivered statements requiring payment of fixed amounts, regardless of whether they continued to be customers of Mountaineer Gas. While the violation of W.Va. Code § 24-2-3 is a question of state law to be resolved by the Supreme Court of Appeals of West Virginia, this Court can and should review that statute and its construction by West Virginia's highest court as determinative of the deprivation of due process imposed by the respondent.

Rate making bodies which act in a legislative capacity may not act retroactively in fixing rates. *Arizona Grocery Company* v. *Atchison, Topeka, & Santa Fe Railway Company, et al.*, 284 U.S. 370. The legislative role of the respondent, and the limitations on that role, have been confirmed by the Supreme Court of Appeals of West Virginia. By permitting and calculating "repayment obligations," the respondent has undeniably engaged in retroactive rate making.

If the Petition is granted, it will certainly not be the first time that this Court has addressed the constitutional bar to retroactive ratemaking and taken the opportunity to reiterate that that bar exists for the protection of both utilities and their customers. *Board of Public Utility Commissioners, et al.* v. *New York Telephone Company*, 271 U.S. 23. The contested actions of respondent clearly fall within the scope of this prohibition and for that reason alone should be reversed after a grant of the Petition.

The constitutional bar to retroactive ratemaking is supported by fairness and anchored in sound public policy. The property interests at stake go far beyond the dollar amounts reflected in respondent's July 10, 1985, "Commission Order Approving Repayment Obligations After Further Comment" (Pet. App. B, pp.

53a and 54a), which range from the $50,951 "rebate" awarded Kaiser Aluminum to the $815,627 surcharge imposed on Weirton Steel. These industrial customers have a compelling interest in conducting their operations in an efficient fashion and were deprived of that opportunity by respondent's unauthorized rewriting of Rule 30C. The viability of business depends in large part on its ability to monitor and control costs, including the cost of purchased natural gas, and to choose between that commodity and other alternative fuels in the operation of factories and plants. Those efforts since July 1, 1980, are now meaningless because the respondent has improperly recalculated earlier periods and permitted a public utility to assess a clearly supplemental, and retroactive, charge on the gas utilized in that prior period. The right of these industrial customers to remain cognizant of and, if appropriate, to participate in proceedings before the respondent is invaluable. That right was disregarded by the respondent in Case No. 83-348-G-30C.

For reasons not disclosed, the Supreme Court of Appeals of West Virginia declined to review this proceeding on either statutory or constitutional grounds. Pet. App. A. In fact, the only tribunal which has addressed any of these issues is respondent itself. In short, most of the persons vitally interested in, or directly impacted by, Case No. 83-348-G-30C have not had their day in court. The patently arbitrary result is a clear deprivation of due process which must be checked by this Court if fairness to those affected by state regulatory bodies is to be preserved.

CONCLUSION

WHEREFORE, *amici curiae* respectfully request that this Court grant petitioner's Petition for Writ of Certiorari from the Supreme Court of Appeals of West Virginia for the reasons set forth.

Respectfully submitted,

MICHAEL A. ALBERT
JACKSON, KELLY, HOLT & O'FARRELL
1600 Laidley Tower
P. O. Box 553
Charleston, West Virginia 25322

Counsel for Diamond Shamrock Corporation, E. I. duPont de Nemours & Company, Inc., The Fostoria Glass Company, Globe Refractories, The Goodyear Tire & Rubber Company, Keyser Glass Container Company, Inc., Koppers Company, Inc., The Homer Laughlin China Company, Monsanto Company, Quaker State Oil Refining Corporation, Signode Supply Corporation, and Wheeling-Pittsburgh Steel Corporation